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EX PARTE OR LATE FILED

John W. Kure
Executive Director - Federal Regulatory

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SEP 01 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

September 1, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 – 12th Street, SW, TWA-325
Washington, DC 20554

RE: CC Docket No. 96-45: Universal Service -- ILEC Universal Service Contributions in Access

CC Docket No. 96-262: Access Charge Reform -- ILEC Universal Service Contributions in Access

Dear Ms. Salas:

On September 1,1999, Steve Beck and the undersigned, representing U S WEST, met, via telephone, with Lisa Gelb, John Ingle and Jim Carr of the Office of General Council and Rich Lerner of the Competitive Pricing Division of the Common Carrier Bureau to discuss the above-referenced proceeding. Attached is a copy of the letter and attachment used as the basis of the discussion.

In accordance with Section 1.1206 of the Commission's rules, an original and three copies of this letter and the attachment are being filed with your office for inclusion in the public record.

Acknowledgment and date of receipt of this submission are requested. A duplicate of this letter is provided for this purpose. Please call if you have any questions.

Sincerely,

Attachments
Copy w/ Attachments: Ms. Lisa Boehley
Mr. Jim Carr
Mr. John Ingle
Ms. Lisa Gelb
Ms. Jane Jackson
Mr. Rich Lerner
Ms. Judy Nitsche

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September 1, 1999

WRITTEN EX PARTE

Lisa Gelb, Esquire
Federal Communications Commission
445 12th Street, SW, Room A806
Washington, D.C. 20554

RE: CC Docket No. 96-45: Universal Service -- ILEC Universal Service Contributions in Access

CC Docket No. 96-262: Access Charge Reform -- ILEC Universal Service Contributions in Access

Dear Ms. Gelb:

Thank you for agreeing to meet with U S WEST on Wednesday, September 1, at 10:00, EDT regarding the recovery of ILEC Universal Service contributions. During this meeting I plan to discuss the attached paper prepared by the U S WEST legal department regarding this issue. As noted in the paper, U S WEST believes that

- The FCC has the ability to take a reasonable period of time to determine the correct course of action and does not have to implement immediately any action in response to the recent ruling from the Fifth Circuit Court of Appeals.
- During this reasonable period the recovery of contributions can continue in Access.
- If the FCC develops a final solution, no particular remedy is prescribed by the Court, leaving the FCC to allow the same flexibility for the ILECs as other contributors have.

While the legal analysis indicates that the FCC has much flexibility to develop a transition period and establish a final solution for recovery of ILEC contributions, the policy reasons for doing such are

- Most of the ILECs including U S WEST Communications cannot implement a billing mechanism to recover these contributions until April of 2000. Besides the normal effort to design and implement a new billing routine, the Year 2000 efforts preclude doing anything until next year. A rate change may be possible this year but not a new rate element.

- If the FCC feels it must do something as early as October 1 to remove the contributions, the resulting temporary solution will only cause confusion and consternation on the part of those paying the rates.
- One suggested interim solution is to have the ILECs continue their contributions but accrue the recovery until a permanent method is implemented. This is unacceptable. It asks the ILEC to become the banker and it asks the eventual ratepayer to pay a higher amount once the new method is implemented.
- The final solution must allow the ILEC the same flexibility to explicitly recover the contributions just like any other contributor unless the FCC is prepared to order that all contributors recover their contributions in the same manner. Now that intrastate revenues cannot be used to set the contribution, this should be easy for the FCC to accomplish.
- U S WEST does agree that as part of the final solution the recovery of the contributions should be removed from price caps. The annual productivity factor adjustment does not allow all of the contribution to be recovered.

Again, thanks for taking the time to discuss this issue with U S WEST.

Sincerely,

John Kure
Executive Director –
Federal Regulatory

Attachment

EFFECT OF *TEXAS OFFICE OF PUBLIC UTILITIES COUNSEL v. FCC* ON RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS THROUGH ACCESS CHARGES

INTRODUCTION

On July 30, 1999, the Fifth Circuit issued its decision in *Texas Office of Public Utilities Counsel v. FCC*, ___ F.3d ___, 1999 U.S. App. LEXIS 17941 (5th Cir. 1999) (*TOPUC*). In that decision, it reversed that part of the FCC's *First Report and Order* (*FRO*) on universal service that mandated ILECs to recover their universal service contributions through access charges. That holding follows:

> Because the agency continues to require implicit subsidies for ILEC's [sic] in violation of a plain, direct statutory command, we reverse its decision to require ILEC's [sic] to recover universal service contributions from their interstate access charges.

TOPUC at *66. This seemingly simple proclamation has engendered substantial confusion regarding the FCC's duties regarding contributions and access charges in the wake of the *TOPUC* decision. U S WEST submits its analysis of this issue for the Staff's consideration.

There are three main conclusions to be drawn from the *TOPUC* decision rejecting the FCC's mandate that USF contributions be recovered in access charges:

1. The FCC has the ability to take a reasonable amount of time to determine the correct course and execute a transition plan to reach the proper destination pursuant to the terms of the *TOPUC* opinion.[1]
2. The *TOPUC* decision does not dictate what is to happen while the FCC deliberates over what to do in light of the reversal of its requirement that contributions be recovered from access. However, it clearly allows the FCC to permit the status quo in the interim, which is the best transition plan from the viewpoints of both carriers and consumers.
3. If the FCC takes action, it should allow all carriers flexibility in recovery of USF contributions so long as those mechanisms do not have the effect of maintaining any implicit subsidies.

Thus, the Commission should act, if at all, with only deliberate speed to determine first the ultimate solution to this implicit subsidy problem, and then it should devise an appropriate and brief transition plan to get there. Nothing in the *TOPUC* opinion prohibits this course and it is the wisest way to proceed.

ANALYSIS

I. THE FCC HAS A REASONABLE PERIOD OF TIME TO DELIBERATE AND ACT.

To the extent FCC action is appropriate,[2] the *TOPUC* opinion clearly gives the FCC the latitude to mull over and solve this problem with all deliberate speed, rather than proceeding with reckless abandon, likely reaching a bad result. Moreover, the *TOPUC* court also gave the FCC the discretion to utilize a reasonable and limited transition period to implement its chosen solution.

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[1] There is general consensus on this viewpoint in the ILEC industry.

[2] The Court clearly did not mandate FCC action on this point. Indeed, it chose not to explicitly order the FCC to act on this score. It did not even remand on this issue; it merely reversed for lack of statutory authority to order the maintenance of implicit subsidies. *TOPUC* at *66, 144. Although Court did state the Act contained a "command that any support for universal service be 'explicit,'" it is also apparent that the Act did not put a deadline on fulfilling that command. *TOPUC* at *64.

The authority for these propositions lies in various parts of the *TOPUC* opinion where the Court repeatedly deferred to the FCC's pace and excused claims of unreasonable delay. First, the Court rejected GTE's claim that the FCC violated the Act by not implementing a universal service plan in the FRO (15 months after passage of the Act), stating

> Congress assumed the implementation process would occur over a transition period after the fifteen-month deadline [set by the Act for the FRO]. There is no reason to believe – and GTE does not offer a reason – that the instruction to establish a timetable actually means immediate implementation of the explicit subsidy system at the statutory deadline.

TOPUC at *100-01. Similarly, there is no deadline at all for the FCC to remove implicit subsidies from access.[3] On the same point, the Court elaborated:

> We follow the Eight Circuit's recent holding on a similar issue: "The Commission has made a predictive judgment, based on evidence in the record and adequately explained in the order, that competitive pressures in the local exchange market will not threaten universal service during the interim period until the permanent, explicit universal service support mechanisms have been fully implemented."

TOPUC at *103. As will be demonstrated below, just as the FCC had substantial justifications for not immediately implementing a USF, so it has significant and weighty reasons for deciding to utilize a transition period.

Second, in affirming the FCC's decision to delay the implementation of the rural high cost fund, the Court reasoned in the following manner:

> A statute [sic] survives judicial scrutiny under the APA's "arbitrary and capricious" standard as long as the agency "articulates a rational relationship between the facts found and the choice made" and "so long as the agency gave at least minimal consideration to relevant facts contained in the record."

TOPUC at *110. Again, below it will be demonstrated that a similar rational basis exists for deferring a decision on recovery of contributions for a reasonable period.

Finally, in affirming the 200,000 loop rule – providing a transition period to carriers with fewer than 200,000 access lines – the Court stated

> In contrast to the situation involving the rural carrier exemption, the FCC has set a specific date for the end of this transitional period: January 1, 2000. Accordingly, the agency's commitment to a specific date for termination of the support resulting from the 200,000-loop rule makes the rule sufficiently transitional to avoid judicial review. Therefore, for lack of ripeness, we will not review Vermont's challenge to the effects of the 200,000-loop distinction.

TOPUC at *112. Obviously, the FCC can take advantage of this principle here to justify a reasonable and limited transition period.

In sum, Congress itself foresaw the need for a transition period in moving from the old regime to an explicit universal service scheme. Moreover, the FCC can take a reasonable time to deliberate and transition so long as it sets a specific date for the end of the transition, which can easily be done.

[3] Indeed, given the fact that other implicit subsidies exist in access, no legitimate argument can be made that the FCC should act in haste on this particular implicit subsidy while allowing the others to be dealt with, if at all, in a more deliberate fashion.

In addition, even in the absence of a self-imposed deadline, the FCC can justify a deliberation and transition period if it gives "minimal consideration" to the evidence and there is a mere "rational relationship" between the facts and the choice to deliberate and transition. Clearly, such a rational relationship exists here. First, this is a complex problem that simply cannot be resolved between now and the expected date of the release of the mandate on the *TOPUC* decision: September 20, 1999. In fact, it took fifteen months to come up with the order that was reversed by the Fifth Circuit. It surely will take a matter of months, rather than a few weeks to make the appropriate decision. Moreover, resolution of so important an issue in so short a time would undoubtedly deprive the ILECs of due process.

II. DURING THE DELIBERATION/TRANSITION PERIOD, THE STATUS QUO SHOULD REIGN.

What should occur regarding USF contributions in the interim between the Fifth Circuit's mandate and the eventual FCC solution? Frankly, the Fifth Circuit provides little guidance. It simply reversed the portion of the FRO mandating recovery through access charges, leaving no standard in its place and not even remanding to the FCC for further ruling. On the other hand, as already described, the Court also confirmed the FCC's latitude to leave the status quo in place for an interim measure so long as it does one of two things:

1. dictate a deadline for the end of the interim period or
2. find a rational basis in fact for choosing the status quo as a temporary solution.

> neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.

FRO, ¶47. The other option would add one thing to the first option: an increase in either the SLC or the PICC in the interim. Although this may mitigate the amount of under-recovery by the ILECs in the transition, it suffers from all the other faults of option one: competitive harm and consumer confusion.

Hence, the best approach under the law is to mandate the status quo regarding recovery of contributions for an interim period. Legal justification for this approach can be achieved either by setting an April 1, 2000 deadline for a permanent solution or by making a rational finding that this approach is far better than the alternative.

III. THE PERMANENT SOLUTION SHOULD ALLOW ALL CARRIERS FLEXIBILITY OF RECOVERY SUBJECT TO REVIEW FOR IMPLICIT SUBSIDIES.

What ultimately should be done in light of the *TOPUC* decision? The best course of action is to allow all carriers flexibility to recover their contributions in any reasonable and explicit manner. In other words, choices about whether to recover from end users or carriers or both or to assess a per line charge or a percentage surcharge on revenue should be left to the individual carriers so long as the recovery mechanism does not maintain or create implicit subsidies. This solution would obey section 254(e)'s command to make universal service explicit, and it would also be consistent with the competitive neutrality principle.

In addition, this resolution is consistent with the *TOPUC* reasoning. Any concern that the Court mandated an end user charge is misplaced. The Court in fact clearly, by default, left that question open for the FCC's determination at this point. It noted that GTE and the FCC disagreed over whether "explicit" meant "'explicit to the consumer'" or "'explicit to the carrier,'" and then refused to decide the issue, stating only that "explicit" means "the opposite of 'implicit.'" In other words, the Court explicitly acknowledged its opportunity to decide that recovery of contributions must be explicit to end users, and it decided not to so rule. If support does not necessarily need to be explicit to the consumer, then there can be no requirement on the FCC to order an end user charge. Moreover, it should be noted that parity of flexibility does not run afoul of the competitive neutrality argument raised by GTE that led to the Court's holding, i.e., that mandating ILECs to recover their contributions through implicit subsidies in access was unlawful discrimination. *See* Brief for Petitioners GTE Entities, Southwestern Bell Telephone Company and BellSouth Corporation at 96-99; Reply Brief for Petitioners GTE Entities, Southwestern Bell Telephone Company and BellSouth Corporation at 60-62. Granting all carriers the same level of flexibility, unlike the former ruling, would be consistent with competitive flexibility.

By: 

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